No. 8600

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

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MOORE DRYDOCK COMPANY (a corporation),
Appellant,

vs.

WARREN H. PILLSBURY, Deputy Commissioner of the United States Employees' Compensation Commission for the 13th Compensation District, MARGARET HOWLAND (a widow), and KENNETH HOWLAND (a minor),
Appellees.

REPLY BRIEF FOR APPELLANT.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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A perusal of the brief for appellee, Warren H. Pillsbury, filed herein, necessitates a reply which, however, will be exceedingly short.

I.

INTRODUCTION.

On page 3 of the brief for said appellee, the effect of the first two assignments of error has been fairly and accurately stated. The third assignment, however, has

been dismissed with a cavalier statement that this court, in a similar case (*Arrow Stevedoring Co. v. Pillsbury,* 88 Fed. (2d) 446), has joined with the Circuit Court of Appeals for the Second Circuit and definitely ruled that the provisions of Section 14(f) are valid to impose additional compensation for unauthorized delay in the payment of compensation previously awarded.

We have never questioned the soundness of this ruling but we have said that the fact that these penalties will be assessed is but further evidence showing an abuse of discretion on the part of the trial court in denying the interlocutory injunction.

Furthermore, the *Arrow* case, supra, is not a similar case because in that case the original jurisdiction of the Deputy Commissioner was not questioned, as it is here. Neither was there any attack upon the jurisdiction of the Deputy Commissioner in the case of *Candado Stevedoring Co. v. Lowe,* 85 Fed. (2d) 119.

II.

REPLY TO ARGUMENT.

There is no doubt that the granting or denying of an interlocutory injunction is addressed to the discretion of the trial court. The purpose of this appeal, however, is to review that discretion for the reason that it is our opinion that it has been abused.

Appellee, on pages 4 and 5 of his brief, attempts to show that the settled construction of the phrase "irrep-

arable damage", adopted by the Federal Courts in three-judge cases involving attempts to enjoin the enforcement of orders of various commissions, is equally applicable in suits seeking to review orders of the United States Employees' Compensation Commission. The analogy is fallacious in the extreme and the cases cited do not support appellee's contention, for in none of them was there present any element of insolvency or inability to repay awards made under an order which might subsequently be judged void.

In *Cambridge Electric Light Co. v. Atwill,* 25 Fed. (2d) 485, there was an effort to obtain a temporary injunction in a suit in equity brought against the public utilities department of Massachusetts to enjoin an order requiring the plaintiff to make material reductions in its rate for domestic and commercial lighting. In this case there was conflicting evidence and the loss, if any, claimed by the plaintiff, was speculative in the extreme. The holding of the court was that governmental acts within the power of a state are presumed valid and should not be interfered with by the federal court upon a mere balance of possible injuries. In the case at bar it is a conceded fact that if appellant is forced to pay the award under review, and that award should ultimately be determined to be void, appellant would never be able to recover from appellees Howland any of the payments because of their financial irresponsibility and inability to repay.

The case of *Albee Godfrey Whale Creek Co. v. Perkins,* 6 Fed. Sup. 409, is even less in point, for in this case the interlocutory injunction was denied in a

suit which had for its original purpose a proceeding to enjoin any hearing at all by the State Industrial Board of New York. In this case it was said by the court "that the danger is as yet speculative and the time has not come to fend against it."

In the case at bar the danger is not speculative, the award has already been made and additional penalties for nonpayment have been assessed.

Koppers Gas & Coke Co. v. United States, 11 Fed. Sup. 467, was a proceeding by a shipper to enjoin an order of the Interstate Commerce Commission requiring carriers to cease making certain allowances to shippers. Application for temporary injunction was denied upon the ground that even if the order were ultimately enjoined, the shipper would at most have lost allowances during the period of suit, an entirely different situation from that which prevails here.

In *Henderson Co. v. Thompson,* 12 Fed. Sup. 519, there was a suit to enjoin an order of the Texas Railroad Commission limiting the use of plaintiff's gas wells. A preliminary injunction was denied upon the ground that the order deprived the plaintiff of nothing at all but merely postponed its enjoyment of it if the order should prove to be invalid.

The foregoing cases are found on page 5 of appellee's brief.

It is said by appellee that "if the facts conclusively show that it would be inequitable and unjust to award a restraining order, the court has no discretion in the matter and must refuse it", citing in support of this

statement the case of *Brehme v. Watson,* 67 Fed. (2d) 359, a decision rendered by this court. It is unfortunate that counsel did not also cite the sentence which directly follows the above quotation. That sentence is pertinent to an understanding of the opinion. It reads as follows:

> "Such order will not be granted when good conscience does not require it; where it will operate oppressively or contrary to justice; where it is not reasonable and equitable under the circumstances of the case." (Page 361.)

Furthermore, it appears in this case that the petition of appellee for an order restraining appellant contained no allegation that such an order was necessary to prevent threatened or imminent harm or damage or that any act of appellant in connection with state court actions instituted by appellee would in any wise interfere with or prevent the due administration of the bankruptcy court.

Notwithstanding the assertion of appellee's brief to the contrary, the whole doctrine that insolvency or inability to repay sums paid under a void award rests in the ill-considered decision of Judge Ritter in *Continental Casualty Co. v. Lawson,* 2 Fed. Sup. 459. Every case cited in appellee's brief on this point stems in that case and all we have is a collection of parrot-like reiteration of Judge Ritter's language.

It is said on page 9 of appellee's brief that the rule adopted by Judge Ritter cannot discriminate against the employer who has secured the payment of com-

pensation by insurance and the adequately financed self-insurer in favor of the marginal self-insurer. This is scarcely a realistic statement. If the marginal self-insurer, whose business would be wrecked by an interim payment of an award which he could not recover if the order upon which it is based should prove to be invalid, can obtain a preliminary injunction, the fact that the adequately financed self-insurer, or one who has secured compensation by insurance cannot under similar circumstances obtain a preliminary injunction, shows there is discrimination. This discrimination inevitably flows from the rule propounded by Judge Ritter.

An effort is made on pages 12, 13 and 14 of appellee's brief to show that *Northwestern Stevedoring Co. v. Marshall,* 41 Fed. (2d) 28, is *stare decisis* on the errors alleged by appellant. This case merely decides that if the plaintiff could not succeed on the allegations of his bill on the merits, there could be no abuse of discretion in denying the interlocutory injunction even though the showing of irreparable damage was adequate. There, as here, the showing was substantially the insolvency of the employee. There is no word in the decision in support of any contention that the showing was inadequate and the question has never been determined by this court. The *Marshall* case was decided on the merits and as the plaintiff failed on the merits, there was clearly no abuse of discretion in denying the interlocutory injunction.

In every case where a temporary injunction has been denied, the plaintiff has ultimately failed in his

attack upon the validity of the order under review. Consequently, in no case yet reported could it fairly be said that there was any abuse of discretion in denying the interlocutory injunction. If the plaintiff cannot prevail upon the merits, he certainly is not entitled to provisional relief. Furthermore, in none of the reported cases has there been an attack upon the essential basic jurisdiction of the Deputy Commissioner. That is the basis of the attack here. To say that one who is forced in the interim to pay an award subsequently held invalid when he cannot possibly recover back the payment, does not suffer irreparable damage, is merely to close one's eyes to the facts and to the settled construction of the phrase.

Judge Ritter attempts to justify his decision upon the ground that Congress did not mean to adopt the settled construction of irreparable damage. Nevertheless the words are in the statute, they had a settled construction at the time the statute was adopted, and apart from the imaginings of Judge Ritter, there is no evidence that Congress ever intended to do anything but adopt the settled construction.

On page 16 of appellee's brief there is a feeble effort to rely upon the case of *Crowell v. Benson,* 285 U. S. 22 at p. 44, and certain direct quotation is put into the mouth of Chief Justice Hughes as if the quotation represented his attitude on the question. The fact is that the Chief Justice was merely summarizing the provisions of the statute and not expressing his view upon what does or does not constitute irreparable damage.

CONCLUSION.

In conclusion, it is respectfully submitted that the order of the District Court should be reversed.

Dated, San Francisco,
October 15, 1937.

Respectfully submitted,
EMMETT CASHIN,
HAROLD M. SAWYER,
Solicitors for Appellant.